STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 23, 2006
v	No. 258564 Wayne Circuit Court
MAURICE MARCEL SIMPKINS, Defendant-Appellant.	LC No. 04-003956

Before: Hoekstra, P.J., and Wilder and Zahra, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of armed robbery, MCL 750.529, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. He was sentenced as an habitual second offender, MCL 769.10, to concurrent prison terms of 15 to 30 years for the armed robbery conviction and 40 to 60 months for the felon in possession of a firearm conviction, to be preceded by a consecutive two-year sentence for the felony-firearm conviction. Defendant appeals as of right. We affirm. This case is being decided without oral argument under MCR 7.214(E).

Defendant's sole issue on appeal is that the trial court erred in denying his motion to suppress the photographic identification. We disagree. When reviewing the denial of the motion to suppress, we will only reverse if the trial court's decision to admit identification evidence was clearly erroneous. *People v Kurylczyk*, 443 Mich 289, 303; 505 NW2d 528 (1993).[1] Further, we will only set aside eyewitness identification at trial, following initial identification by photograph, when the procedures were so "impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *People v Anderson*, 389 Mich 155, 168; 205 NW2d 461 (1973), overruled in part on other grounds by *People v Hickman*, 470 Mich 602, 603-604; 684 NW2d 267 (2004).

[1] All cites to *Kurylczyk* in this opinion are to portions of Justice Griffin's lead opinion in that case which constituted a majority opinion. Specifically, Justice Mallett joined the lead opinion in its entirety. Justice Boyle, joined by Justice Riley, concurred in all relevant parts of the lead opinion. *Kurylczyk , supra* at 318 (Boyle, J.).

Defendant argues that the photo show-up in this case was erroneous because it was not properly preserved and, therefore, defendant had no way of obtaining the evidence, which may have been favorable to him. Additionally, defendant states that although there is no indication that evidence was purposely suppressed, if the court had viewed the photographic array, there was a reasonable probability that the motion would have been granted.

The trial court ruled that there was no undue influence in this case because the victim was left alone to pick out a photo she recognized, all the photos she was given were of black males, and all were either Polaroid or digital photos. A photographic lineup[2] is not considered improperly suggestive "as long as it contains some photographs that are fairly representative of the defendant's physical features and thus sufficient to reasonably test the identification." *Kurylczyk*, *supra* at 304, quoting Sobel, Eyewitness Identification, § 5.3(a), pp 5-9 to 5-10. Therefore, because the photos were all of black males, similar in character, and the victim was left alone to make the identification, the trial court reasonably concluded that it was not unduly suggestive.

Further, defendant contends that the fact that the photo show-up was not preserved demonstrated bad faith by the police. Additionally, because the show up was not preserved, defendant claims that plaintiff possessed favorable evidence that defendant could neither possess nor obtain with reasonable diligence and that this was a violation of his constitutional right to due process.

Absent intentional suppression or a showing of bad faith, the loss of evidence before a defense request does not warrant relief. *People v Johnson*, 197 Mich App 362, 365; 494 NW2d 873 (1992). Further, careless destruction of evidence by police, which does not involve gross negligence or intentional suppression, does not require reversal. *Id*. The burden of showing that the police acted in bad faith lies with the defendant. *Id*. Additionally, "unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." *People v Huttenga*, 196 Mich App 633, 643; 493 NW2d 486 (1992), quoting *Arizona v Youngblood*, 488 US 51, 58; 109 S Ct 333; 102 L Ed 2d 281 (1988).

Here, defendant contends that the mere fact that the photo show-up was not preserved involved bad faith by the police. We disagree. This Court held in *Johnson* that the defendant's assertion that the police purposely destroyed exculpatory evidence without any support but the defendant's own testimony was not enough evidence to warrant relief. *Id.* at 366. This case does not involve any evidence of the police acting in bad faith, with gross negligence or intentionally

[2] We assume for purposes of discussion that the victim's perusal of the relevant police mug books constituted a photographic "lineup." But this is questionable because there was no known suspect at the time. Rather, the police simply asked the victim to look through the mug books to see if any of the people in the photos in them looked like her assailant. See Black's Law Dictionary (8th ed), p 949 (defining a lineup as "[a] police identification procedure in which a criminal suspect and other physically similar persons are shown to the victim or a witness to determine whether the suspect can be identified as the perpetrator of the crime.").

destroying evidence because it was exculpatory. Thus, defendant has not established a due process violation and is not entitled to relief.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Kurtis T. Wilder
/s/ Brian K. Zahra